A

ANDAWAN ANSAPI & ORS

v.

PP

B

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[APPEAL NO: K41-128-2010]
4 MARCH 2011

C ***CRIMINAL LAW:*** *Forest Enactment 1968 (Sabah) - Sections 20(1)(b)(iii) & 20(1)(c)(i) - Cultivating land within Forest Reserve without authority - Appellants natives of Sabah - Whether could claim native customary rights in respect of land in Forest Reserve - Whether offence not proved - Whether to be acquitted and discharged*

D ***NATIVE LAW AND CUSTOM:*** *Native customary rights - Authority to occupy land - Whether native customary rights could not be claimed in a Forest Reserve - Whether legislation has neither abolished nor extinguished native customary rights - Whether appellants gave unrebutted evidence on their claim for native customary rights - Whether 'native customary rights' equates to 'right to life' - Federal Constitution, art. 5 - Forest Enactment 1968 (Sabah), ss. 20(1)(b)(iii) & 20(1)(c)(i)*

E

This was an appeal by the appellants against the conviction and sentence meted out by the Magistrate's court. The appellants
F were charged under s. 20(1)(b)(iii) and 20(1)(c)(i) of the Forest Enactment 1968. Briefly, the facts were that the appellants had cultivated an area of land (land) within the Kuala Tomani Forest Reserve (KT Forest Reserve) without any express authority granted under any provision of the Forest Enactment. They were
G arrested, charged in court and after a full trial, the Magistrate found that the appellants did not have any authority to occupy the land in the KT Forest Reserve and consequently convicted them. The appellants, in their defence, contended that they had native customary rights to be on the KT Forest Reserve and had
H produced historical evidence to support their claim. The issue that arose was whether the Magistrate was correct in law to conclude that native customary rights could not be claimed in a Forest Reserve.

I

Held (allowing the appeal; setting aside the order of the Magistrate):

(1) The legal status of native customary rights in this country is well established. Customary law is a practice by the habit of the people and not the dictate of the written law; and legislation has neither abolished nor extinguished native customary rights (*Nor Anak Nyawai & Ors v. Borneo Pulp Plantation & Ors; Superintendent of Lands & Surveys Miri Division & Anor v. Madeli Salleh*). "Native customary rights" equates to "right to life" under art. 5 of the Federal Constitution. The Magistrate was wrong in saying native customary rights could not be established in a Forest Reserve. (paras 6 & 8)

(2) It was clear from the evidence led by the prosecution that they did not even attempt to prove that the appellants did not have any authority to remain on the land by virtue of the native customary rights claimed. The evidence given by the appellants with care on their claim for native customary rights had not been rebutted in any way. The appellants had shown (i) the burial grounds found in the vicinity of the land belonged to their ancestors and were in existence even before the forest reserve was gazetted; (ii) evidence of fruit trees and crops cultivated by their ancestors on the land. The appellants had raised reasonable doubt in the prosecution's case relating to the non-existence of authority to be on the land and hence should also at the end of the defence have been discharged and acquitted. (paras 14 & 15)

[Fine imposed by the Magistrate returned to the appellants.]

Case(s) referred to:

Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 1 LNS 114 ***(refd)***

Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 ***(refd)***

Sipadan Dive Centre Sdn Bhd & Ors v. The State Government of the State of Sabah [2011] 3 CLJ 308 HC ***(refd)***

Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 5

Forest Enactment 1968 (Sabah), s. 20(1)(b)(iii), (c)(i)

For the appellants - Ram Singh (Fulton Mark Sitiwin with him); M/s Ram Singh Harbans & Co
For the respondent - Mohd Zairi Zainal Abidin DPP

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah J:

Proceeding

[1] This is an appeal by the appellants against the conviction and sentence meted out by the Magistrate's Court at Tenom on 12 November 2010. The appellants were charged under s. 20(1)(b)(iii) and 20(1)(c)(i) of the Forest Enactment 1968 which respectively reads as follows:

> 20(1) Unless expressly authorized by or under the provisions of the Enactment:
>
> (b) any person who –
>
> (iii) cultivates any land or clears or digs up any land for cultivation or for any other purpose,
>
> in any Forest Reserve shall be guilty of an offence.
>
> 20(c) any person who -
>
> (i) enters any part of a Forest Reserve which has been closed by or under the rules
>
> Shall be guilty of an offence and liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both, such fine and imprisonment.

Background Facts

[2] The appellants had cultivated an area of land (land) within the Kuala Tomani Forest Reserve (KT Forest Reserve) without any express authority granted under any provision of the Forest Enactment. They were arrested and charged in court for offences set out above. After a full trial, the Magistrate found that the appellants did not have any authority to occupy the land in the KT Forest Reserve and consequently convicted them. The

appellants in their defence had contended that they have native customary rights to be on the KT Forest Reserve and produced historical evidence to support their claim. The Magistrate however held as follows:

> However the native cannot claim customary right pertaining land gazetted as forest reserve. This is obvious and clear.

[3] By that ruling, the Magistrate did not address her mind on whether the appellants could have authority to be on the land by virtue of their native customary rights. The Learned Magistrate also failed to determine whether the appellants did in fact possess native customary rights on the land.

Issues

[4] Having read the record of appeal and heard submissions from counsel, in my view these are the determinative issues:

1. Is the Magistrate correct in law to conclude that native customary rights cannot be claimed in a Forest Reserve?

2. If the Magistrate is wrong, what is the consequence of her findings in respect of this appeal?

Issue 1

Is The Magistrate Correct To Conclude That Native Customary Rights Cannot Be Claimed In A Forest Reserve?

[5] To recap, in her ruling the Magistrate said it is 'obvious and clear' that no native customary rights can be claimed in a Forest Reserve which incidentally, prior to the gazetting by the government is State Land (see s. 5 Sabah Forest Enactment 1968). I fully understand the manner in which the Magistrate came to her conclusion as the sections which the appellants were charged with specifically speak of 'express authority given by and under the provisions of the Forest Enactment'. However and with respect to both the prosecution and the Magistrate, notice should have been taken of the appellants' claim of native customary rights when it was flagged before them.

[6] The legal status of native customary rights in this country in my view is well established. The well known case of *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769 had held that customary law is a practice by the habit of the people and not the dictate of the written law; and

A legislation has neither abolished nor extinguished native customary rights. The learned judge there further states that 'if the present generation can prove that they are practicing which historians described as having been practiced 200 years ago, then that is sufficient proof that such native customary rights had been
B practiced 200 years ago'. The learned judge's view is upheld by the Federal Court decision in *Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509. Arifin Zakaria FCJ (as he then was, now CJM), in delivering the judgment of the court said:

C

> [21] The learned State Attorney General vehemently contended that *Adong* and *Nor Anak Nyawai* should not be followed because they were decisions rooted upon the Australian case of *Mabo (No. 2)*, an authority for the proposition that the common law of Australia which recognizes a form of "native titles" and the
> D Canadian case of *Calder v. AG of British Columbia* which held that the "common law categorically recognized native rights over land".
>
> [22] With respect, we are of the view that the proposition of law as enunciated in these two cases reflected the common law
> E position with regard to native titles throughout the Commonwealth. And it was held by Brennan J, Mason CJ and McHugh J, concurring, in *Mabo (No. 2)* that by the common law, the Crown may acquire a radical title or ultimate title to the land but the Crown did not thereby acquire absolute beneficial ownership of the land. The Crown's right or interest is subject
> F to any native rights over such land. They adopted the view of the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 AC 399, where the Privy Council in an appeal from the Supreme Court of Nigeria held that the radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of
> G which he is head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes. At p. 407 Viscount Haldane observed:
>
> H
>
> > In the light afforded by the narrative, it is not admissible to conclude the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. In the case of *Oduntan Onisiwo v. Attorney-General of*
> > I *Southern Nigeria* (2) decided by the Supreme Court of the colony in 1912, Osbourne CJ laid down as regards the effect of the cession of 1861, that he was of the opinion

> that "the ownership rights of private landowners, including the families of the Idejos, were left entirely unimpaired, and as freely exercisable after the Cession as before." In this view their Lordships concur. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are *prima facie* to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing. No doubt questions of difficulty may arise in individual instances as to the effect in law of the terms of particular documents. But when the broad question is raised as to what is meant by the provision in the Public Lands Ordinance of 1903, that where the lands to be taken are the property of a native community, the head chief may sell and convey it, the answer must be that he is to convey a full native title of usufruct, and that adequate compensation for what is so conveyed must be awarded for distribution among the members of the community entitled, for apportionment as the Native Council of the District, with the sanction of the Governor, may determine. The chief is only the agent through whom the transaction is to take place, and he is to be dealt with as representing not only his own but the other interests affected.

[7] The decision of the Federal Court was applied by Linton Albert J in *Haji Abdillah bin Haji Abdul Hamid v. ACLR of Semporna and Sabah State Government* (T21-58-2006) and I also had no hesitation to follow in my recent judgment in *Sipadan Dive Centre Sdn Bhd & Ors v. The State Government of the State of Sabah* [2011] 3 CLJ 308. I have in the case of *Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 1 LNS 114 said this on what native customary rights entail:

> Let me also add that natives are the original inhabitants of the country and to treat claims for NCR by looking at it only from the point of ownership of the lands by the natives is not entirely correct. These claims should be looked at with the concept that the natives are part of the land as are the trees, mountains, hills, animals, fishes and rivers. My basis for saying this is simple. Prior to the arrival of white settlement there was no system of land ownership as we have now. There was no food processing factory then and they survived by foraging the land. The fruits on the wild trees, the fishes in the river, the wild boars and other

A animals on the land are their food for survival. It is not insignificant in this country that they are known as 'bumiputras'. It is my view that this concept must be kept at the forefront of our minds when dealing with native claims to lands.

B **[8]** It has also been said "native customary rights' equates to 'right to life' under art. 5 of the Federal Constitution.

In the circumstance, I hold that the Magistrate was wrong in saying native customary rights cannot be established in a Forest Reserve. With that I now move to the next issue.

C

Issue 2

If The Magistrate Is Wrong, What Is The Consequence Of Her Finding In Respect Of This Appeal?

D **[9]** Had the Magistrate recognized the fact that the appellants could lay claim to native customary rights in a forest reserve; the trial would have taken a different but the correct course. The Federal Court decision in *Madeli* dictates that one must read s. 20(1)(b)(iii) and 20(1)(c)(i) of the Forest Enactment subject to E the rights of the appellants to claim native customary rights. What that entails is simply that the word 'authority' in the above mentioned sections of the Forest Enactment 1968 cannot be limited to authority under the provisions of the Forest Enactment. In short, if the appellants possess native customary rights to the F land, they have the authority to be on the land to cultivate and do other things which their 'adat' allows them to do.

[10] At this juncture, we must be reminded that this is a criminal matter which requires the prosecution to bear the burden G throughout the whole trial to prove every ingredients of the offence beyond reasonable doubt. What that means is this. At the end of the prosecution case, a *prima facie* case must be established before defence is called. *Prima facie* case is established when the court, after maximum evaluation of the prosecution H evidence, is ready to convict the accused if he or she remains silent. In short, the standard of proof is beyond reasonable doubt. At the end of the defence, the court, again after maximum evaluation of the totality of the evidence, must determine whether there is reasonable doubt in the prosecution case and if so, the I appellants are entitled to be discharged and acquitted.

[11] What then are the ingredients in the offence which the appellants are charged with? As far as this appeal is concerned, the presence of the appellants in the KT Forest Reserve is not disputed. What is strongly disputed by the appellants is the prosecution's allegation that they do not possess any form of authority to remain on the land. In view of my earlier conclusion and the fact that the appellants had during the prosecution case, through cross examination, led evidence that they had the right to remain on the land by virtue of their native customary rights, the pertinent question to be asked is this:

> Have the prosecution proved that the appellants did not possess native customary rights in the land?

[12] Since the prosecution carries the burden of proving the case in a criminal matter, the appellants cannot be found to be without authority to remain on the land unless the prosecution has successfully proved that they do not possess native customary rights. The basic ingredient of 'authority' in the context of this offence is intertwined with native customary rights. Hence the prosecution have a duty to investigate the claim of native customary rights of the appellants.

[13] Unfortunately because of their understanding of the law, it is clear from the evidence led by the prosecution that they did not even attempt to prove that the appellants did not have any authority to remain on the land by virtue of the native customary rights claimed. That being the case, the consequence is simply that the appellants should have been discharged and acquitted at the end of the prosecution case.

[14] Even if I am wrong in my view as to what should happen at the end of the prosecution case, it does not aid the prosecution and my reasons are these. I have read the evidence given by the appellants with care on their claim for native customary rights and since their evidence was not rebutted in any way, I have no doubt in my mind that at the end of the trial, the appellants have raised reasonable doubt in the prosecution's case relating to the non-existence of authority to be on the land and hence should also at the end of the defence have been discharged and acquitted. For completeness, such evidences are these:

A **1. Burial Grounds Found In The Vicinity Of The Land**

The appellants have shown that the burial grounds found in the vicinity of the land belong to their ancestors and were in existence even before the forest reserve was gazetted. This can be seen from the examination-in-chief of the following witnesses:

B

DW1 – Andawan Ansapi

Q: Cuba lihat IDD12, 13, 14, 15, 16, 17, 18, 19. Secara spesifik apa ini?

C

A: Kuburan 'beliau-beliau' (nenek moyang).

Q: Di mana terdapat kuburan ni?

A: Di kg Imahit.

D

Q: Berapa jauh kuburan dengan tempat kejadian?

A: Jalan kaki tidak sampai 1 jam.

DW8 – Ambise bin Mantang

E

Q: Kamu dibesarkan di kg mahit, apa cara kehidupan kamu?

A: Cara hidup di Imahit, buat ladang padi bukit. Hasil dari tanaman padi adalah kehidupan kami.

F

Q: Berapa lama berladang di Mahit?

A: Saya tidak tahu berapa puluh tahun.

Q: Seingat kamu di mahit, ingatkah ada kuburan di sana?

G

A: Memang kuburan-kuburan itu sudah sedia ada, bila suda besar, bila ada orang mati, saya pernah kebumikan orang2 yang mati.

DW11 – Mohd. Sabli B. Shaffie @ Ambarog b. Sandulog

H

Q: Encik tahu adat kampong Mahit ini?

A: Tahu.

Q: Cuba lihat di peta hujung ni?

I

A: Ini tanda-tanda dikebumikan.

Q: Kaum?

A: Murut Tagol.

Q: Cuba beri sedikit keterangan tentang kuburan Murut Tagol mengikut lakaran ni?

A: Tanda-tanda ni cara buat lubang ambil kulit kayu fintanong, taruh sebagai lapik dan ambil batang bamboo sebagai bakul, di tepi lubang. Nampak macam cantiklah.

Q: Mayat disimpan di mana?

A: Di tengah-tengah lubang.

Q: Ada simpan tanah dalam lubang tu?

A: Mayat dibaring dalam lubang masuk dalam keranda, dimasuk di dalam, kemudian ambil kayu ikut ukuran lubang tu, isi kayu sehingga penuh, ambil lagi kulit kayu fintanong, tutup lagi dan baru ditimbus. Selepas ditimbus, kira-kira 2-3 tahun memang tidak tahan kayu pandai buruk, ia jatuh, itulah bekas ada lubang-lubang.

Q: Sebagai Ketua Kampung Kapulu yang dekat Mahit, agak-agak berapa tahun kuburan di Mahit tu?

A: Wujud Kapulu wujudlah Imahit- agak-agak tahun 1950-an.

Q: Keterangan encik, hutan simpan Kuala Tomani diwartakan pada 1984, adakah kuburan sebelum 1984?

A: Ada.

2. Evidence Of Fruit Trees And Crops Cultivated By Their Ancestors On The Land

There was also evidence of the existence of crops cultivated by the appellant's ancestors on the land. The appellants have continued the practice initiated by their ancestors before the gazette came in 1984. This can be seen from the evidence of witnesses during the trial:

DW1 – Andawan bin Ansapi

Q: Rujuk gambar-gambar-IDD1.

A: Ini pokok durian.

Q: Di mana tempat?

A: Kawasan Kg. Imahit.

Q: Dan IDD2 pokok langsat?

A: Ya.

Q: Apa kegunaan pokok langsat bagi orang Murut?

A: Durian dan langsat-sumber ekonomi kami.

Q: Adakah kamu walau bukan seorang pakar tahu berapa tahun pokok ni?

A: 40 tahun pun ada.

Q: Maksud kamu dalam 40 tahun, orang-orang kamu sudah berada di sana?

A: Sudah ada.

Q: Cuba lihat IDD 3,4,5,6,7,8,9,10,11-ini adalah gambar pokok-pokok, di mana dapat?

A: Imahit.

Q: Apa maksud ada pokok-pokok seperti ini?

A: Bagi kami, menandakan kampong itu jadi saksi di kemudian hari seperti sekarang ini.

Q: Berapa lama sudah tanaman ni?

A: 40 tahun.

Q: Pernah kamu atau kaum kamu tinggal di kawasan pokok buah-buahan ni?

A: Pernah tinggal.

DW3 – Ansanam @ Azmain bin Yapau

Q: Encik ada dengar andawan dan barani bagi keterangan. Ada encik mau tambah?

A: Ada mau tambah tentang pokok2 buah, pokok terutama durian memang betul ada di sana. Sejak 1977 saya kahwin isteri saya, memang milik mereka. Untuk kuatkan tanaman ini ditanam. Durian ini jika ditanam isinya tebal, sebab kita pilih.

Q: Kalau kita pergi ke tempat kejadian, boleh nampak pokok tu? A

A: Boleh.

Q: Berapa besar/tinggi pokok tu?

A: Satu tangan tidak boleh (ukur). Tinggi 80 kaki lebih. B

Q: Agak2 berapa tahun?

A: Tidak ingat. Memang nampak pokok tua.

[15] Accordingly, I allow this appeal and set aside the order of the Magistrate. I also order that the fine imposed by the Magistrate returned to the appellants. C

[16] Order accordingly. D

E

F

G

H

I